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No. 83-850

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,

Petitioner,

vs.

JAMES CONNORS KARO, ET AL.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS HARLEY AND HORTON

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QUESTIONS PRESENTED[1]

1. Whether warrantless installation of a beeper inside a container of chemicals with the consent of the original owner violates the Fourth Amendment rights of a suspect in a drug manufacturing scheme to whom the container is subsequently transferred.

2. Whether the warrantless monitoring of signals from a beeper installed inside a container of chemicals that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home or other "private" area (such as a commercial storage locker).

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[1]Respondents, [illegible]LEY and HORTON, have objected to the formulation of the issues by the Government; have proposed reformulations consistent with this Court's landmark case of *Katz* v. *United States*, 389 U.S. 347, 350-351 (1967), (Resp. ii, 2-4); and continue to object. This writer would also point out that the surplusage in the questions presented is factually inaccurate. This is not a "drug manufacturing scheme" nor did the Government reasonably believe that it was, (J.A. 102-103; see "Statement", *infra*).

REFORMATIONS OF THE QUESTIONS PRESENTED AS REURGED BY RESPONDENTS

1. Whether a citizen has a reasonable expectation of privacy in a sealed chattel expected to be delivered to him that would be abridged by the warrantless insertion of an electronic signalling device which was intended for the purpose of monitoring the movements of that chattel after it came into his possession.

2. Whether a citizen has a reasonable expectation of privacy that would be abridged by the warrantless operation and monitoring of an electronic signalling device secreted within his or her personal property located inside his or her residence or other private area.

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BRIEF FOR RESPONDENTS HARLEY AND HORTON

STATEMENT

This is a case involving a criminal investigation in Albuquerque, New Mexico where the Government suspected that a certain shipment of ether was destined to be utilized in a plan to "precipitate [cocaine] out of clothes" which had been "brought in [to the country]," (J.A. 103). This

suspicion was based on information received prior to September, 1980 from a confidential informant named MUEHLENWEG (J.A. 102-103). The ether was purchased by MUEHLENWEG acting as an agent for Respondents KARO, HARLEY, and HORTON, who had jointly contributed to the purchase price, (J.A. 145-146). On September 10, 1980, Assistant U. S. Attorney BLACKMER and DEA Agent ROTTINGER applied to obtain a warrant[2] from U. S. District Judge MECHEM which would allow them to implant a "beeper" in one of the cans of ether, (J.A. 42). In the affidavit supporting the application (which was a collaborative effort on the part of both BLACKMER and ROTTINGER, see J.A. 124, 129-130), Agent BLACKMER swore: (1) that MUEHLENWEG was the target of the investigation; (2) that amphetamine manufacturing was the subject of investigation; and (3) that the suspicions of the Government had been corroborated by the discovery of amphetamine manufacturing schemes of MUEHLENWEG and his associate LOGAN, (J.A. 43-45). The Court authorized the "beeper" installation by an order limited to thirty days (extensions were sought and granted). Declining to "install" a beeper in the shipment, the Federal Agents replaced one of the ether drums with one of their own drums containing a "beeper,"[3]

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[2]This application for a warrant which was substantially similar to that required for TITLE III electronic surveillance was apparently undertaken under a policy of the New Mexico U.S. Attorney's office to use "Title III" as a "guideline" for obtaining electronic signalling devices (J.A. 133-134).

[3]The order only authorized installation (Gov. Ex. 5; J.A. 72-75); however, the agents substituted a Government drum complete with "beeper" instead, (J.A. 72-75).

later delivering the entire shipment to MUEHLENWEG who later delivered it to KARO. After installation and delivery of the "beeper", the Federal Agents time and time again eschewed visual surveillance in favor of the electronic signals which were used to follow the ether throughout the city into five separate residences and two private storage lockers during over five months of surveillance, (Pet. Brief at 5-6). The Federal Agents lost track of the drum several times and only by use of the "beeper" were the agents able to resume surveillance, (Pet. Brief at 5-6). Finally, in February of 1981, the Federal Agents tracked the ether to a residence in Taos, New Mexico where a search warrant was executed which resulted in the arrests of Respondents HARLEY, HORTON, STEELE, and ROTH, (J.A. 48, 63-65), and the seizure of a large amount of cocaine, (J.A. 48, 63-65).

At a subsequent hearing on a Motion to Suppress filed by Respondents, the Government admitted that, at the time of obtaining the "beeper" installation warrant, Assistant U.S. Attorney BLACKMER and DEA Agent ROTTINGER knew the following: (1) that MUEHLENWEG was not the target although the Government did know the names of those who were the actual targets; (2) that the Government suspected a scheme to "precipitate . . . [cocaine] out of clothes . . . brought in;" and (3) that the prior amphetamine manufacturing schemes of MUEHLENWEG and his associate were not related to this investigation nor to the actual targets, (J.A. 103)[4]. At hear-

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[4]DEFENSE COUNSEL: Just to clarify, Agent HASTINGS, we were discussing earlier in my examination, the investigation with respect to LOGAN and the investigation which resulted in

(Continued on next page)

ing, the Government defended this affidavit as a legitimate method to shield the confidential informant status of MUEHLENWEG (J.A. 136-137), and further represented that U. S. District Judge MECHEM was a party to the deception because BLACKMER and ROTTINGER testified that they made unsworn and unrecorded representations to Judge MECHEM, informing him of the confidential informant status of MUEHLENWEG although omitting the other inaccuracies, and convincing him to issue the warrant upon the false affidavit (J.A. 116-117, 126). Defense Counsel interviewed Judge MECHEM and proffered evidence to the Court that the Judge did not remember such remarks, (J.A. 144). Further, in defense, BLACKMER claimed that he resorted to the misleading affidavit when he found that MUEHLENWEG'S cousin worked in the U. S. Magistrate's office downstairs. However, at no time did BLACKMER explain why he thought that the cousin would have access to a sealed affidavit in District Court, (J.A. 130, et seq.). The Government later brought out testimony that there was no "genuine concern" that MUEHLENWEG'S status as an informer would be disclosed from a "sealed" affidavit in the U. S. District Court.[5]

(Continued from previous page)

this prosecution. Those two investigations were unrelated, were they not? AGENT HASTINGS: Yes, sir. (J.A. 103) • • • AGENT ROTTINGER: In the initial case opening of this investigation, it was understood from Carl MUEHLENWEG that KARO would acquire ether and then turn it over to HARLEY and HORTON for an extraction process of cocaine. (J.A. 119) • • • THE COURT: At that time you knew of the KARO, HARLEY and HORTON. AGENT ROTTINGER: I knew of those names, yes, sir. THE COURT: Now, in addition, you knew Mr. MUEHLENWEG had told you that this investigation on your part would involve cocaine and not amphetamines, isn't that correct? AGENT ROTTINGER: Correct. (J.A. 119)

[5]PROSECUTOR: I want to leave no misimpression or suggestion to the contrary, Mr. BLACKMER. You have utterly no

(Continued on next page)

Following this hearing, United States District Judge BRATTON suppressed the evidence gained in the search of the Taos house as fruits of the unlawful warrantless installation and monitoring of the "beeper" (J.A. 155-158), and later denied the Government's Motion to Reconsider (Pet. App. 16a-23a). An appeal was taken by the Government in which the Government argued that neither the installation nor the monitoring of the "beeper" required a warrant, (Appellant's Brief 1 et seq.).[6]

The Court of Appeals for the Tenth Circuit affirmed the District Court, holding that the warrantless installation violated the Fourth Amendment, *United States v. Karo*, 710 F.2d 1433, 1438 (10th Cir. 1983).

The Tenth Circuit also held that the warrantless monitoring of the beeper inside homes and other private areas was also a violation of the Fourth Amendment, *Karo*, 710 F.2d at 1440.

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reason to believe, either through laxness or otherwise, that anyone in the Court offices might inadvertently let these things become public, that's not a genuine concern? ASST. U.S. ATTORNEY BLACKMER: Not a genuine concern, but it can happen, something [266] could be unsealed or somebody, maybe for dishonest purposes, goes in and takes off the — PROSECUTOR: But you have no reason at all to suspect that in this case, do you? ASST. U.S. ATTORNEY BLACKMER: No, not in this case and not in general in this Federal Court. (J.A. 141-142)

[6] However, the Government did not argue below that the affidavit was valid; or that probable cause existed outside the affidavit (Appellant's Brief 1 et seq.).

SUMMARY OF ARGUMENT

The Respondents argue that the warrant clause of the Fourth Amendment should be applied to both installation and monitoring of the devices known as "beepers", *U.S. Constitution*, Amend. IV. This is because historically and legally the warrant requirement has been an essential element of our national experience. For example, the abuses of a general warrant were a primary cause of our armed struggle for independence. In our own time the Fourth Amendment is an essential element in the bulwark drawn around the rights of privacy enjoyed by every citizen. The reasons underlying the warrant requirement: (1) the undesirability of allowing the sanctity and privacy of the home, person, and effects, to rest upon the hurried decision of a law enforcement officer; *Johnson v. United States*, 333 U.S. 10, 14 (1948); (2) the desirability of leaving the sanctity and privacy of the home, person, and effects under the safeguard of a neutral and detached magistrate passing upon the reasons for such intrusion, *Johnson*, 333 U.S. at 14; (3) the desirability of making it less likely that a search once begun would not exceed proper limits bounds; *United States v. Chadwick*, 433 U.S. 1, 9 (1977); and (4) the desirability of providing post-search notice in a surreptitious search situation: (a) that a search did occur, (b) who conducted it?, (c) under what authority?, and (d) under what limits? (see 18 U.S.C. 2510 et seq.). There has been no showing that these concerns are any less valid in our modern setting or in the context of a "beeper" search. Since this Court has made the warrant requirement applicable to containers, *Chadwick, supra* and even more applicable to homes, *Mincey v. Arizona*, 437 U.S. 385 (1978), and other private areas, *G.M. Leas-*

ing Corp. v. United States, 429 U.S. 338 (1977), the Respondents would argue that the warrant clause must be applied. This is especially so in our case where we have an actual physical trespass for five months within both containers and homes, etc., which could have gained and actually did gain significant information for the investigations.

The Government's arguments in favor of exempting "beeper" searches from the warrant clause on the grounds that the invasions in question were not significant enough to be considered a search under the Fourth Amendment rests in large part on the idea that a beeper installation is a minimal search which gains minimal fruit. The concept that a minimal search is still a search was established by *Terry v. Ohio*, 392 U.S. 1 (1968). The actual physical trespass into a protected area coupled with an intention to gather evidence or gain information must be considered a search, *Katz v. United States*, 389 U.S. 347 (1967). The Government's analogies to dog sniffing and binocular cases are inapposite because it is the machine *which monitors the beeper* that is analogous to the binocular or the dog's nose and the Respondents do not complain of that device. The only proper analogy would be an odor enhancing device or a device which enhanced visibility secreted *inside* a container or a structure. This would not be constitutionally permissible *Katz, supra.* And the fruits in this case were not minimal. Indeed, in the proper case "beeper" evidence as to how long an object was at a place or when an object was at a place could be an important factor in investigations or even trials. The fact is that the "beeper" search provided more infor-

mation than visual surveillance. The "beeper" told the agents that the drum was in locker No. 15 thus allowing them to follow it to the situs of the laboratory. If visual surveillance were utilized, the drum could have been in any one of a hundred locations and the agents would have lacked probable cause as to any specific location. Thus the search involved: (1) an actual trespass to gain information; (2) invasion of containers and homes, etc., where an expectation of privacy exists, *Chadwick, Mincey;* and (3) obtaining significant information.

The Government asks in the alternative that it be allowed to install and monitor beepers under an expectation to the warrant clause which would only require reasonable suspicion. However, the fact that the search is somewhat limited in intensity cannot bring this case within the *Terry* line of cases because of the five month duration and the seven locality expanse. In addition, the *Terry* line of cases all require some sort of exigent circumstances which make getting a warrant not feasible. Here, the agents easily obtained a warrant which could serve as a model for "beeper" warrants save for the fact that the Government lied in its affidavit, a situation which hopefully can be rectified in other cases.

It is also of grave concern to Counsel that the absence of the warrant requirement would render the Court and the public ignorant of the actual extent of Government beeper surveillance except as to the comparatively rare cases: (1) where there was a subsequent criminal prosecution; and (2) where the Government had to use evidence gained from beepers or otherwise disclose that they had "beepered." Otherwise, domestic surveillance

and other undisclosed beepers could continue to proliferate without check, unnoticed by both its guilty and its innocent victims. As beepers and their progeny are technologically capable of making every object and person a transmitter of tell-tale signals, the capacity is there for a surveillance state. Most activities now protected by the Bill of Rights would be "chilled" by unactivated beepers or monitored by activated beepers. For these reasons the general warrant requirement should apply.

Additionally, the Respondents call for suppression of the evidence under the Court's supervisory powers as an alternate ground, *United States v. New York Telephone Co.*, 434 U.S. 159 (1977). We cannot reward the Government for concocting a false warrant by granting them a new exception to the Fourth Amendment's requirement for warrants, *McNabb v. United States*, 318 U.S. 332 (1942).

ARGUMENT

The Government asks this Court to extend to it the right to install electronic signalling devices or "beepers" inside the property and effects of its citizens and also to extend to it the right to monitor those devices wherever they may be taken, whether home, office, or highway. In response, the Respondents agree that the Government should have the ability to obtain such rights. The Government asks that it be able to exercise these rights solely upon its own discretion and judgment. In response, the Respondents disagree and ask that the exercise of such

rights be conditioned upon securing a warrant from a neutral magistrate.

I. THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT SHOULD BE APPLIED TO BOTH THE INSTALLATION OF A "BEEPER" IN ITEMS OF PERSONAL PROPERTY AND TO THE MONITORING OF A "BEEPER" WITHIN PRIVATE RESIDENCES AND OTHER PRIVATE AREAS.

A. The Fourth Amendment Evidences a Strong Preference for Warrants to Authorize Searches.

This Court has recognized that the warrant requirement contained in the Fourth Amendment is the rule rather than the exception in enforcing "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," *U.S. CONST.*, Amend. IV.[7]

Indeed this overriding preference for a specific and particular judicial warrant not only runs through the course of our legal history in England and America, *Weeks v. United States*, 232 U.S. 383, 391-393 (1914); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); II Hale, *The History of the Pleas of the Crown*, pp. 149-52 (1st Am.Ed. 1847); Landynski, *Search and Seizure and*

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[7]The Government's contention that: "Neither the language nor the history of the Fourth Amendment reflects any intention to require warrants as a condition to a lawful search and seizure," Pet. *Brief* at 14, is belied by history, and by the holdings of this Court, "searches conducted outside judicial process . . . are *per se* unreasonable . . .," *Katz v. United States*, 389 U.S. 347, 357 (1967); same, *United States v. Ross*, 456 U.S. 798, 810-811 (1982); "*per se* unreasonable . . . unless . . . accomplished pursuant to judicial warrant . . .," *United States v. Place*, 77 L.Ed.2d 110, 116-117 (1983); see also *Payton v. New York*, 445 U.S. 573, 583-584 (1980). The Government's position appears to ask that the rule (of the warrant requirement) be made the exception and that the exceptions be made the rule.

the Supreme Court, pp. 20-48 (1937), but is also declared to be the catalytic agent by which our struggle for independence and hence our nation were created. *Boyd v. United States*, 116 U.S. 616, 625 (1886); Landynski, *Search and Seizure*, at 34-37; Larson, *The History and Development of the Fourth Amendment to the United States Constitution*, 13 et seq. (1937). Aside from history and precedent, the legal reasoning underpinning this warrant requirement is as vital and valid today as when first stated The bases most often alluded to by the Courts include: (1) the undesirability of allowing the sanctity and privacy of the home, person, and effects, to rest solely upon the hurried decision of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948); (2) the desirability of leaving the sanctity and privacy of the home, person, and effects under the safeguard of a neutral and detached magistrate passing upon the reasons for such intrusion, *Johnson*, 333 U.S. at 14; and (3) the desirability of making it less likely that a search once begun would "not exceed proper bounds," *United States v. Chadwick*, 433 U.S. 1, 9 (1977).[8] There is no wonder that this

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[8]A further rationale supporting the warrant requirement is "notice or assuring" that the individual whose property is to be be searched or seized of the "proper authorization" of the executing officers, his need to search, and the "lawful limits" of his power to search. *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967). While the Government is correct in stating that pre-search notice is not present in a covert "beeper surveillance" case, Pet. *Brief*, at 41, the warrant would give post-search notice that search had in fact occurred, who conducted it, for what cause, and under what limits. Thus, it would serve the same salutory purposes as a warrant posted on a citizen's door giving notice of a search performed in his or her absence, or as a warrant disclosed after the fact in Title III Surveillance, 18 U.S.C. 2510.

Court has repeatedly and often "unanimously rejected" attempts to ignore this strong preference for warrants, *Ross*, 456 U.S. 810-811,[9] and indeed the wonder is that the Government again brings this issue before the Court. There has been no showing by the Government that our modern police are any less zealous and thus a neutral magistrate is any less salutory as a safeguard of the sanctity and privacy of home, person, and effects. Likewise, there has been no showing that the need to define and enforce at least some limitations in the extent of a beeper search is not desirable nor beneficial in a Fourth Amendment context.[10]

1. Such Preference for Warrants Extends to Items of Personal Property Such as Containers.

This long established warrant requirement has been held applicable to packages, luggage, and other containers, *Ex Parte Jackson*, 96 U.S. 727, 733 (1878); *United States v. Van Leeuwen*, 397 U.S. 249 (1970); *United States v. Chadwick*, 433 U.S. 7-11. The Trial Court and the Tenth Circuit in *Karo* held that the ether drum was a container protected by the Fourth Amendment and thus applied the warrant requirement against the intrusion of the "beeper", *Karo*, 710 F.2d 1437-1439. In applying the warrant requirement, the Tenth Circuit Court reasoned

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[9]See also *Mincey v. Arizona*, 437 U.S. 385, 390-393 (1978); *Torres v. Puerto Rico*, 442 U.S. 465, 470-474 (1979).

[10]Again, the limitations of Title III Surveillance warrants regarding duration, purposes, etc. are helpful as a general model, although many of the other special requirements for Title III Surveillance would neither be necessary nor relevant. 18 U.S.C. 2510, et seq.

that any citizen has an "expectation of privacy that objects coming into their rightful possession do not have electronic devices attached to them" which betray presence and movement, *Karo*, 710 F.2d at 1438. This is but common sense.

2. An Even Stronger Preference for Warrants Protects Private Residences and Other Private Areas.

The warrant requirement has been even more strictly applied to intrusions within homes, offices, and other private areas, *United States v. Steagald*, 451 U.S. 204, 217-222 (1981). And if there ever was a "bright line" in the Fourth Amendment context it is drawn squarely across the doorway of the home. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," *Silverman v. United States*, 365 U.S. 505, 511 (1961). In *Payton*, this Court made a compact and succinct statement regarding the close relationship of the warrant clause to privacy and sanctity of the home: "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. See also *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978). This Court has taken an adamant stand against law enforcement "exceptions" invading this "bright line", *Mincey v. Arizona*, 437 U.S. 385, 393-395 (1978); *Torres, supra.*

B. There are no Constitutionally Compelling Reasons why an Exception to the Warrant Requirement Should be Established to Allow Warrantless Installation of a "Beeper" in an Item of Personal Property or to Allow Warrantless Monitoring of a "Beeper" Within Private Residences and Other Private Areas.

In seeking to avoid rather than deny the validity of the premises above, the Government argues: (1) that the intrusion did not constitute a search; (2) that the fact that the search is limited in some respects places it in the *Terry v. Ohio* line of exceptions to the warrant requirement so as to require only reasonable suspicion as justification; and (3) that obtaining a warrant in cases such as this is neither feasible nor beneficial.

1. The Invasions in Question are Significant Enough to be Considered Searches Under the Fourth Amendment.

The Government argues that the intrusion of installation and the intrusion of monitoring were not searches for various reasons: (a) that the "beeper" was installed with the consent of one[11] in lawful possession at the time, (Pet. *Brief* at 17-20); (b) that the intrusion of a "beeper" in a container wherever it is monitored is too trival for Fourth Amendment purposes, (Pet. *Brief* at 17-21); and (c) that the possible fruits of a "beeper" search are too minimal for Fourth Amendment consideration, (Pet. *Brief* at 22).

a. *Consent.* The Tenth Circuit in *Karo* decisively rejected the premise that the Government could implant an electronic surveillance device in a container when it was in

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[11]Government informant MUEHLENWEG

the possession of another and cause it to be delivered to an unknowing citizen, thereby insulating its installation from the warrant requirement, *Karo*, 710 F.2d at 1437-1439.[12] This proposition merely follows the position of this Court since Justice Clark declared in 1921 that an otherwise unauthorized search does not become constitutionally reasonable when its fruits are "obtained by stealth instead of by force or coercion," *Gouled v. United States*, 255 U.S. 298, 305 (1921). A contrary position would invite the Government to secrete microphones in private property and thus engage in Title III Surveillance without satisfying any of the strictures imposed by Title III and the Constitution, (18 U.S.C. 2510, et seq.). In *Katz*, the fact that the Government had achieved the intrusion by placing the microphone on the outside of the telephone booth in an area of common access rather than in the telephone booth (arguably with the consent of the telephone company) was of "no constitutional significance," *Katz*, 389 U.S. at 354.

b. *Minimal Search and Minimal Possible Fruits.* (i) *Minimal Search.* In seeking to shield its new technology from the strictures of the Fourth Amendment, the Government argues first, that it is such a minimal intrusion as to be exempt from consideration, and second, that the possible fruits of such an intrusion are too minimal to be considered a search. In regard to the issue of minimal intrusion the Respondents would argue that the intrusion is not minimal nor can it be minimal if it intrudes into a protected area or item. No case cited by the Government answers this

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[12]In accord: see *United States v. Moore*, 562 F.2d 106, 111 (1st Cir. 1977) cert. denied, 435 U.S. 926 (1978); *United States v. Clayborne*, 584 F.2d 346, 349 at n.1; contra: *United States v. Knotts*, 662 F.2d 515, 517 n.2 (8th Cir. 1981), rev'd on other grounds, 103 S.Ct. 1081 (1983); *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980).

precise question in the Government's favor and in the Government's precedent of *Terry v. Ohio*, 392 U.S. 1 (1968), a minimal seizure is still a seizure and a minimal search is still a search, *Terry*, 392 U.S. at 16-17. Cases abound where minimal intrusions have been held to implicate the Fourth Amendment, "the lowering of the tail gate" of a pickup, *United States v. Frisbie*, 550 F.2d 335, 340 (5th Cir. 1977); "looking behind a mirror" after a consentual entry into a home, *United States v. Clarke*, 451 F.2d 584, 585 (5th Cir. 1971); "trying [a] key in a lock," *United States v. Portillo-Reyes*, 529 F.2d 844, 849 (9th Cir. 1975).

In response the Government declares that not all surveillance implicates the Fourth Amendment (which is true) and that "beeper" surveillance should be likened to "dog sniff" cases or "binocular" cases (Pet. 14, Pet. *Brief* at 30).[13] These cases are not analytically similar. First, it is the device which monitors the "beeper" that is analogous to the "sniffing dog" or the binocular-wielding policeman. The Respondents do not complain about the enhanced sensitivity of the monitor, rather the Respondents complain of the enhancement produced from *within* the confines of their container and from *within* the confines of

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[13]The Government also makes an even more dubious analogy between "beeper" surveillance and the Government's access to the information compiled by pen registers (by which the telephone company records numbers dialed). In such cases this Court has upheld the view that a combination of implied consent with a lowered expectation of privacy through citizens using external telephone company lines rendered the Fourth Amendment inapplicable. *Smith v. Maryland*, 442 U.S. 735, 742-746 (1979). To say that because a citizen purchases articles of property in his daily life which are usually transported to the home or office by vehicles that he has implicitly consented to and must reasonably expect that the movement of such items be forever known to his Government, wherever he may move or place such articles, is ludicrous.

their residences and other private areas. To analogize the "dog sniff" cases one would have to imagine the Government installing an odor enhancement device *within* a protected container or protected area which allowed a dog some distance away to smell the odors within. To analogize the "binocular" cases one would have to hypothesize a situation where the police were able to install a floodlight *inside* a residence at night turning it on at the propitious moment to expose the activities inside to a policeman with binoculars some distance away. Neither of these two analogies would escape the strictures of *Katz* and the Fourth Amendment. The word "enhancement" is not a talisman insulating police conduct from the Fourth Amendment.[14]

(ii.) *Minimal Possible Fruits.* The Government argues that the beeper only says: "I am here," and that therefore the fact that a "beeper" only produces this minimal fruit should allow the "beeper" to avoid application of the Fourth Amendment and the warrant clause, Pet. *Brief* at 17-23. Would a constable who was near-sighted, and hard of hearing (and therefore capable of discovering little) be subject to lessened constitutional restrictions in his opening of a container or his entrance into a dwelling? Would a search of a container or dwelling limited to a single item

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[14]Even if the "beeper" operating within is ignored, the term "enhancement" cannot be utilized to justify the overruling of *Katz* nor eliminating the expectations of privacy announced therein. A device capable of viewing or sensing through walls is no more constitutionally tolerable than the *Katz* microphone that would overhear inside a protected area from outside a protected area, *Katz*, 389 U.S. at 352-353.

or a single bit of information, whether important or unimportant to an investigation, be immune from the requirements of the Fourth Amendment?

In this case, the information provided by the beeper was vital to the continuing investigation and was not "minimal" even in that sense. In another case, the "evidence" that a beeper was monitored at a certain location at a certain time, or was monitored at a location for a certain length of time could be crucial not only to the investigation, but to a subsequent trial on the merits.

The Government also seeks to advance its minimal possible fruits premise by stating that the "beeper" signals gave no more information than visual surveillance would have given.[15] This is simply not the case. The Government admitted that: "To be sure, it is theoretically possible that a five-gallon can in which a beeper has been installed could be taken inside private premises, where it could be replaced by, or concealed within, another container or transferred to a vehicle before being taken to another location," (Pet. *Brief* at 28 n.13). However, the Government contended that "such 'shell game' maneuvers would not necessarily defeat visual surveillance," (id).

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[15]This argument has another flaw. Aside from the fact that the "beeper" did providence more information than visual surveillance, the fact is that the Government did not in fact use visual surveillance for the greater part of the five month surveillance of the drums and relied on the "beeper" to relocate the drums time and time again when they were lost. Thus, the Government's arguments can be boiled down to the proposition that the Government might have surveilled legally, but did not, an argument which hardly passes constitutional muster, *Davis* v. *Mississippi*, 394 U.S. 721 725 n.4 (1969).

The Government hypothesizes that: "The authorities could undertake surveillance of any suspicious container that is removed from the premises and follow it to its next location, and they could follow any vehicle leaving the premises," (id). Thus, the Government claims that with an infinite number of agents, the Government could have followed all vehicles leaving the locations, then followed all vehicles leaving their destinations and so on for the entire five month period. However, it should be apparent to a careful observer that the beeper tells more than visual surveillance, especially in the circumstances just described. In this case the "beeper" told the agents that the drum was at storage locker no. 15, allowing them to follow it to the Taos house where it again said "I'm here," supplying probable cause to believe the "drum" and hence the cocaine was at the Taos house (J.A. 56-61). In the multiple "shell game" hypothesis, visual surveillance would have only told the agents that the drum was under one of a hundred, or two hundred, or of however many "shells" accumulated during the five months. Even a one in thirty chance does not equate with probable cause to search a specific location.

In summary, we have: (1) actual trespass into the container and into the homes, etc. for the purpose of gaining and relaying information;[16] (2) typical expectation of privacy in containers and in homes, etc.; and (3) significant information obtainable and actually obtained in this case.

2. The Circumstances of "Beeper" Surveillance do not Support the Creating of a New Exception to the Warrant Requirement.

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[16]The Government admitted that: "... perhaps the beeper's continued presence after transfer of the container to a new owner constituted a technical trespass," (Pet. *Brief*, at 20); and that: "... the beeper may have been 'trespassing' on Respondent's property (Pet. *Brief* at 27).

The Government next argues that if its "beeper" intrusion is a search under the Fourth Amendment, then this Court should create a new exception to the warrant requirement, (Pet. *Brief* at 31-38). The Government argues that this exception should be created because: (1) combatting drug traffic is a substantial consideration, (Pet. *Brief* at 35-36); (2) the search was limited, (Pet. *Brief* at 20-23); (3) police efficiency would be increased, (Pet. *Brief* at 31); and obtaining a warrant is not feasible, (Pet. *Brief* at 43-45).

a. *Needs of a Law Enforcement.* The Government contends that its efforts at law enforcement would be aided by exact knowledge of the location and movement of its citizen's chattels. (No doubt!) Toward this end, the Government cites *United States v. Martinez-Fuerte,* 428 U.S. 543, 555 (1976), and similar cases, but to little avail. In *Martinez-Fuerte* this Court found the interest of combatting alien and drug smuggling *plus* the proximity of the international boundary to be compelling enough to justify a brief stop and questioning of the occupants of a vehicle, hardly the situation of our case. *Martinez-Fuerte,* 428 U.S. 556-557. In *United States v. Mendenhall,* 446 U.S. 544 (1980), this Court took notice of the drug problem and authorized a *brief stop* of a narcotics suspect under exigent circumstances at an international airport. *Mendenhall,* 446 U.S. at 561-563. However, what would be the outcome in these situations if the public interest could co-exist with the Fourth Amendment interest without injury to either? In our case, warrants, orders to seal, extensions, and the like could and were routinely and easily obtained (RIV Gov. Ex. 5, etc.) which was not the case in the above case. Additionally, the needs of law enforcement in regard to combatting drug traffic must be taken into proper perspective. Confronting an even more serious situation of law

enforcement this Court finally declared that: "Except for the fact that the offense under investigation was a homicide, there was no exigent circumstances in this case . . . • • • [Also] there is no suggestion that a search warrant could not easily and conveniently have been obtained [therefore we] decline to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey*, 437 U.S. at 394. And this premise brings us full circle with *Terry; Mendenhall; Martinez-Fuerte;* see also *Pennsylvania v. Mimms*, 434 U.S. 106 (1969); and *Adams v. Williams*, 407 U.S. 143 (1972), etc. All of these cases involve a situation which presents exigent circumstances and/or insurmountable compliance problems (with the warrant equirement).[17]

b. *Limited Search.* The Government argues that because of "the limited intrusion, if any, on privacy interests resulting from beeper surveillance, use of a beeper to locate a source of illegal drugs is fully justified on the basis of reasonable suspicion that criminal activity is afoot." (Pet. *Brief* at 31-38), thereby seeking to bring the beeper into the *Terry v. Ohio* situation where a compelling public need (which we have already discussed) overcomes a limited intrusion. The Government argues that the intrusion

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[17]In an opinion by Burger, Ch. J., joined in by White, Powell, Rehnquist and Stevens, J.J., this Court reminded the Government that: "Although we have recognized exceptions to the warrant requirement *when specific circumstances render compliance impracticable*, we have not dispensed with the fundamental Fourth Amendment prohibition against unreasonable searches and seizures simply because of a generalized urgency of law enforcement." (Emphasis supplied). *Torres*, 440 U.S. at 473-474. *See also* concurring opinion of Brennan, J., joined by Stewart, Marshall, and Blackmun, J.J., 442 U.S. at 476.

is "slight" because the electronic signalling device only "broadcasts 'here I am'" (Pet. *Brief* at 36-37). What the Government fails to acknowledge is that the *Terry* line of cases that it cites requires that *the intrusion be limited in all respects*, extent of intrusion, duration, and locality, see *Terry, supra; Martinez-Fuerte, supra; Mendenhall, supra.* When we examine any of these cases and, for example, alter the duration factor, the result changes. *Mendenhall* becomes *United States v. Place*, — U.S. —, 103 S.Ct. —, 77 L.Ed.2d 110 (1983) where the Court noted: . . . the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is unreasonable, 77 L.Ed 2d 122, citing *Dunaway v. New York*, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed2d 824 (1979). The same result happens even more forcefully in *Terry* and in *Martinez-Fuerte*. What result when officer McFadden pats and frisks John Terry for five months? What result when Amado Martinez-Fuerte is questioned for five months? Since this Court's opinions in *Chadwick* and *Mincey* applied the Fourth Amendment's warrant requirements to a person's things, containers and home, and since *Place* places a duration requirement on reasonable suspicion intrusions upon things and containers, it would follow that *Terry, Martinez-Fuerte*, and *Mendenhall* lead the Government back to the warrant requirements of the Fourth Amendment.

c. *Police Efficiency.* Police efficiencey has never justified exceptions to the Fourth Amendment. Indeed, this Court has written: "The investigation of crime would always be simplified if warrants were unnecessary [but] the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the

name of maximum simplicity in enforcement of the criminal law." *Mincey*, 437 U.S. 393.

d. *Warrant not Feasible.* The last reason offered by the Government to support a new exception to the Fourth Amendment is that obtaining a warrant would not be feasible. Even aside from the fact that a warrant authorizing the installation and monitoring of the beeper was actually obtained in our case without difficulty, the circumstances of this case and other beeper cases illustrate that because there is usually no exigent circumstances[18] a warrant could be leisurely obtained. Indeed, in this case the speed of normal business channels was too slow for the federal agents who called the chemical company "to expedite the shipment," (J.A. 71). Such circumstances can hardly be called "exigent." Likewise, the general form of the warrant actually used in our case (if one ignores the falsehoods), is a practical and appropriate model: (1) it names the known targets; (2) it states the violations of law believed to be involved; (3) it summarizes anticipated installation and monitoring; and (4) limits monitoring for a set period of time RI 23. In this manner it follows in large part the considerations upon which the warrant clause was created, and follows in a general, non-technical sense the major limitations placed on Title III Surveillance, 18 U.S.C. 2510, et seq. Save for Government's decision to make virtually the entire factual statement false and misleading, (J.A. 155-158), it would have been a good warrant. If the Government can avoid lying in other "beeper" cases, the Government should be able to easily obtain warrants.

3. Obtaining a Warrant is not Only Feasible but Beneficial in "Beeper" Cases.

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[18] If there were exigent circumstances these circumstances would probably obviate the need for a warrant in *that* case. However, there were no exigent circumstances in this case.

Obtaining a warrant in this case is not only feasible, but beneficial in many ways. The first is that the warrant could largely achieve the purposes of the warrant clause as previously outlined. However, even aside from these salutory aspects of requiring a warrant, there is an area of grave concern to this Counsel that "beeper" surveillance which is not subject to judicial limitation could transform this country into a "surveillance state," in other words into *1984*. Justice Rehnquist in *Knotts*, 75 L.Ed.2d at 63 commented that this situation would be handled when it appeared. Similarly, the Government attempted to placate the fears of the suspicious by stating that "post-search judicial review" would be enough to monitor such activity. What is apparently missed by this Court and what is apparently concealed by the Government is the fact that the public and the Court will have no knowledge of the actual extent of use of these devices. The only information this Court could even collect would be those cases where a "beeper" was used, a criminal prosecution was initiated, and the Government disclosed the use of a beeper. Without a warrant requirement, Federal, state, and local agents could use hundreds of thousands of beepers and only disclose a few instances as in the comparatively rare cases listed above. In some areas where criminal prosecutions are rare such as in domestic surveillance, there would never be a ripple on the pond as the Government compiled its information on the comings, goings, and meetings of its citizens. The only persons whose rights to privacy could be vindicated would be a small portion of the guilty and none of the innocent. Surely, if there are areas from which we may not strip the protection of the Warrant Clause, this is one.

4. Unfettered Installation and Monitoring of Beepers and Other Surveillance Devices Poses a Significant Danger to the Republic and its Citizens.

In Counsel's view, granting an exception (or more correctly an exemption) from the requirements of the Fourth Amendment would result in two evils: (1) allowing an unfettered use of beeper surveillance which would permeate our national existence; and (2) allow intrusions by other technological devices on similar grounds.

a. *Unactivated "Beepers".* Personal privacy is effected by the very presence of an unactivated beeper, *Karo,* 710 F.2d at 1438-1439. The Government claims that an unactivated "beeper" harms no one, and analogizes it to a crowbar which has the capability of breaking down a door, but for the present is lying innert, (Pet. *Brief* at 21). This is not a proper analogy since a crowbar cannot instantly perform function without aid and at the flip of a switch as is the case with "beepers." The possibility that a person's effects, clothing, containers, and movements could be instantly monitored would be chilling to many of the rights guaranteed by the Constitution. The fact that Winston Smith's television was *capable* of monitoring him was enough to keep him in perpetual apprehension, although he never knew whether it was being used in this fashion at any given moment, Orwell *1984* (1949).[19] And

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[19]There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system . . . was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live — did live, from habit that became instinct — in the assumption that every sound you made was overhead, and, except in darkness, every movement scrutinized. 1984 at p. 6.

if the populace learned through this case or another that such installations could be authorized by mere police discretion and activated under the same authority, their apprehensions would be the same as that of the hapless Smith.

b. *Activated "Beepers".* Aside from the chilling effects of mere installation, actual monitoring would completely invade the privacy of our citizens. Under the technology of today, the "beepers" could probably trace the movements of any middle size object and whoever was in control of such object. Under the technology of tomorrow, smaller "beepers" or possibly even electronic imprints could be placed on an object (whatever the size) or upon persons and could be monitored by more sensitive, computerized monitors which could handle hundreds or thousands of surveillances simultaneously. Anyone who would declare that such a development is impossible or even improbable is not listening to the ever quickening pulse of technology. Having one's currency, securities, papers, valuables and constantly under surveillance would diminish if not destroy the values which the Bill of Rights seeks to protect.

c. *New Technological Devices.* If the Government is allowed an exception from the Fourth Amendment in this case for the reasons given, would not the Government be able to use a host of other devices on the same rationales? Aside from devices which have not yet been invented, this Counsel sees a host of devices including thermometers, electro-magnetic sensors, electrical meters, "smelling" devices, litmus papers, and whatnot which could be thrust into containers and homes at will on the grounds that they

are but limited intrusions conveying limitated information toward a legitimate purpose (criminal investigation).

Some members of this Court may feel that counsel is raising alarms not necessary to nor necessitated by the cause at hand. In reply, Counsel must point out that the investigative practice sought to be authorized here for "drug manufacturing" schemes is not only pernicious in its allegedly limited uses, but is capable of virtually infinite expansion in scope and application. Should we grant the exception to the warrant requirement urged by the Government there is no logical or legal reasoning which can be utilized to effectively limit its application and scope. The rationales advanced by the Government in support of this "beeper" exception not only fail to limit the exception requested, but act as burgeoning engines for more and wider exceptions.

For example, the Government speaks of the "substantial, if not compelling" interest in combatting drug traffic as a supporting argument. However, if the need to combat drug traffic is allowed to void or minimize the warrant and probable cause requirements of the Fourth Amendment, how can this Court logically or legally bar the way to similar investigations into alien-smuggling, violations, organized crime, tax evasions, customs violations, murders, violent crime, potentially violent subversive organizations, or any area of law enforcement focus. Thus, what appears to be a limitation is merely the tip of the iceberg which must be accepted by this Court if an exception is created.

The enhancement of police investigation efficiency is still another ground offered to support establishing a

"beeper" exception, but this ground is in itself a rationale for unlimited scope and application. For instance, if one opens the door of the Fourth Amendment to the call of police efficiency, how can one successfully complain of later generations of devices on the grounds that they do more, or are more efficient. It would seem that if efficiency is the key that opens the door, that greater efficiency and hence greater capability should open the door even wider.

Also utilized by the Government is the argument that obtaining a warrant is not feasible. This basis is also a source of unlimited encroachment on the Fourth Amendment. In our case we find the combination of: (1) several weeks notice plus (2) an existing model for a warrant plus (3) circumstances where a warrant conforming to the model was actually obtained without serious difficulty. If this set of circumstances presents a situation where obtaining a warrant was not feasible, then when would a warrant be feasible? Across the board, such an approach would emasculate if not eliminate the warrant requirement altogether.

C. The Decision of This Court in Knotts is Consistent With the Application of the Warrant Requirement to "Beeper" Installation Into Private Property and to "Beeper" Monitoring Within Residences or Other Private Areas.

The decision on the Tenth Circuit in *Karo* barring warrantless installation and monitoring is consistent with this Court's decision in *Knotts* and with the other precedents of this Court.

1. *Installation of the "Beeper".* This Court in *Knotts* specifically observed that the legitimacy of the installation was not at issue in the case, 75 L.Ed.2d at 60 n. *.[20] There is apparent conflict between the circuits, with the First and Tenth Circuits applying the warrant requirement and the Fifth, Sixth, Eighth, and Ninth Circuits failing to apply the warrant requirement.[21] However, the Tenth Circuit's opinion did no more than to apply this Court's opinions in *Katz* and in *Chadwick* to the intrusion of the beeper into a container which was entirely lawful in nature, *Katz*, 389 U.S. 347; *Chadwick*, 43 U.S. 1.

The Government argues against a decision requiring warrants for installation on the grounds that such a decision would minimize the applicability of *Knotts*. Neither the Respondents nor the Constitution should suffer because a case presenting a narrower issue preceded a case of wider impact. It is not judicial economy to overrule *Katz* and *Chadwick* simply to enhance the applicability of a recent case of this Court.

2. *Monitoring the "Beeper" Within Residences, etcetera.* The Government urges this is in spite of the fact that Justice Rehnquist specifically observed in *Knotts*

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[20]Three members of this Court voiced concern about the legality of the warrantless installations, *Knotts*, 75 L.Ed 2d at 65, 66.

[21]See *Karo, supra; Moore, supra; Clayborne, supra; United States v. Brock*, 667 F.2d 1311, 1319 n.4 (9th Cir. 1982), cert. denied, No. 81-6922 (Mar. 7, 1983); *United States v. Bailey*, 628 F.2d 938, 943 (6th Cir. 1980); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States v. Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980); cert. denied, 450 U.S. 935 (1981); *United States v. Bruneau*, 594 F.2d 1190, 1194 (8th Cir.), cert. denied, 444 U.S. 847 (1979).

that: "Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned," *Knotts*, 75 L.Ed.2d at 62; and quoted *Johnson v. United States*, 33 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) for the proposition that:

> Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search, is as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. (Citations omitted). *Knotts*, 75 L.Ed.2d at 62.

With the Ninth and perhaps the Fifth in minority,[22] the majority of circuits have uniformly drawn a "bright line" in front of the residence and other private areas, as against "beeper" surveillance which intrudes upon the area, see *Karo, United States v. Moore*, 562 F.2d 106 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), *United States v. Bailey*, 628 F.2d 938, 944 (6th Cir. 1980), *United States v. Cassity*, 720 F.2d 451 (6th Cir. 1983), Slip Opinion Nos. 81-1565 et seq. (October 31, 1983). Both the Tenth Cir-

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[22]See *United States v. Brock*, 667 F.2d 1311 (9th Cir. 1982) *cert. denied* No. 81-6922 (Mar. 7, 1983); however, in *United States v. Michaels*, 645 F.2d 252 (5th Cir. 1981), *cert. denied* 454 U.S. 950, and *United States v. Butts*, 710 F.2d 1139 (5th Cir. 1983) *reh. granted*, does not deal with this specific issue of monitoring of inside residences or other private areas. Indeed none of these cases would support a five month "dragnet" unlimited in all respects.

cuit in *Karo* and the Sixth Circuit in *Cassity* specifically utilized this Court's strong words in *Knotts* to reach their result, *Karo*, 710 F.2d at 1439-1450; *Cassity* (Lexis Opinion), at pp. 4-5. The *Karo* Court would permit law enforcement to intrude into the threshold with "beepers", but only under the aegis of the Magistrate's neutral judgment.

II. SHOULD THE FOURTH AMENDMENT NOT COMPEL SUPPRESSION IN THIS CAUSE, THE EVIDENCE SHOULD STILL BE SUPPRESSED IN ORDER TO PROTECT THE INTEGRITY OF THE COURT THROUGH USE OF ITS SUPERVISORY POWERS.

As this Court will recall, the Respondents in this cause have repeatedly sought to justify suppression of the evidence on the grounds that if the Fourth Amendment is deemed inapplicable then the evidence should be suppressed under the Court's supervisory powers,[23] *Brief for Appellees* (Horton and Harley) at pp. 35-39; Resp. *Brief in Opposition* (Horton and Harley) at pp. 19-20. Looking at the facts, the exercise of this Court's supervisory powers is not only authorized, but required.

The Respondents' version of the facts is that an Assistant United States Attorney and a DEA Agent conducted a false and misleading warrant to which the DEA Agent swore in the Assistant United States Attorney's presence, (J.A. 126-127). The Government's version is even more horrible in this Counsel's eyes. According to

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[23]Respondents continued to raise this issue here because: "because the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

the Government, (Pet. *Brief* at p. 4 n.3), the DEA and the U.S. Attorney's office first conducted this false and misleading affidavit to protect a confidential information; then confidentially revealed to a U.S. District Judge that a portion of the affidavit was false and "that information was omitted," (Pet. *Brief* at 4 n.3); then swore to the false facts before the judge; and then secured the signature of the District Judge on the warrant which had been falsified, (J.A. 127).

We have the complicity of a Federal Agent, a Federal Attorney, and (if you can believe the Government) a Federal Judge in intentionally producing a warrant application that was patently false and misleading.[24] It was only because Defense Counsel chanced upon information which was not public knowledge, to the effect that MUEHLENWEG was an informant that Counsel and the Court could deal with the real facts. As it is, no sanctions have been leveled against the Government's agent or its attorney, *Brief for Appellees*, pp. 35-39, but the Government is still trying to admit the fruits of its lie.

The power of the Federal Courts include the power "to supervise 'the administration of criminal justice' among the parties before the bar," *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980). Such power includes the suppression or exclusion of evidence gained by "willful disobedience of the law," *McNabb v. United States*, 318 U.S. 332, 345 (1942). This power has been recently utilized in a similar Fourth Amendment setting. In that case, the Seventh Circuit declared:

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[24]District Judge Bratton deemed it's as "phoney as a three-dollar bill," (J.A. 156).

> Unless officers of the law know that the consequences of deliberate misrepresentations will be the suppression of the evidence, "lawless or reckless misconduct" will not be encouraged, but invited. * * * Courts must act in their own self-defense against brazen violations of their procedures. We must draw the line at misconduct occurring within our own house. *United States v. Cortina*, 630 F.2d 1207 (7th Cir. 1980).

These principles are clearly applicable to our case where like *Cortina*, the crime was committed in the Court's own chambers. Any result other than suppression would give the Government the benefit of its lie and leave them laughing at both Counsel and the Court. How can we in effect reward this intolerable conduct by granting the Government a new exception to the warrant requirement. What effect would that result have on the Government's respect for the Court? What effect would that result have on the Government's respect for Constitution if we reduce it to part of the loot of their misdeeds.

CONCLUSION AND PRAYER

If the United States Constitution is seen as extolling the virtues of ordered liberty, then the Bill of Rights must be considered as supporting the view that that Order will tend to diminish liberty more and more as the years pass and thus order should itself be restrained in some manner.[25] The central amendments in the Bill of Rights attempt to

[25]See comments of Mr. James Madison, Gales, *Debates and Proceedings in the Congress of the United States*, Vol. 1 (Washington: Gales and Seaton 1834), at Col. 448-449.

protect a core of rights thought to be crucial to the liberty of the individual. Many of these amendments involve or overlap the issue of individual privacy. For example, the First Amendment limits Governmental infringement of "freedom to associate and privacy in one's associations," *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 462 (1948); the Third Amendment protects the privacy of the home against Governmental peacetime quartering of soldiers; the Fourth Amendment protects those spheres in which a person has a "reasonable expectation of privacy," whether in public or in private, *Katz v. United States*, 389 U.S. 347, 350-353 (1967); and the *Katz* Court also noted that "the Fifth Amendment too, 'reflects the Constitution's concern for [the right of each individual] to a private sphere where he may lead a private life,'" citing *Tehan v. Shott*, 382 U.S. 406, 416 (1966), *Katz*, 389 U.S. at 350, n.5. One of the more crucial elements of this bright line is the Fourth Amendment which "protects individual privacy against certain kinds of Governmental intrusion, but its protections go further . . . ," *Katz*, 389 U.S. at 350. An even wider "bright light" is drawn around those privacy interests enjoyed in a citizen's home be it castle or cottage.

Our forefathers did not intend the Fourth Amendment as a law enforcement facilitation act of 1790-91. Rather, the Fourth Amendment was meant to do exactly what its critics complain that it does: impede and hinder law enforcement. Of course it was not intended to do so for the mere sake of impeding and hindering the forces of order, but rather for the purpose of protecting that private sphere upon which Government may not transgress at will. In considering these deliberate constraints placed upon law enforcement, we must be careful to remember that our

founding fathers were intimately familiar with the onerous burden that these brief written passages would place on those charged with maintaining the public order and safety. They knew better than we the dangers posed by granting citizens those rights which would allow many of their private activities to proceed not only unchecked but unmonitored.

No Justice sitting on this Court has experienced anything similar to the crucible of momentous events in which our father's ideas of liberty and order were forged. We have never walked in their footsteps, yet we are charged with the solemn and sworn duty to uphold the very document which was so conceived. It is not an easy task. We can only attempt to remove ourselves from our comparatively complacent and pedestrian existence and to approximate the spirit which gave birth to the Bill of Rights, and specifically the Fourth Amendment. Looking at the Bill of Rights in this light, one is amazed that these former insurrectionists would endanger their own handiwork by deliberately making our infant Government more vulnerable than the great power that they had just overthrown. Counsel can but stand in awe of such courage.

We who have received their legacy find ourselves in a nation of unequalled power and plenty, but yet we may have been cheated out of a portion of this inheritance. Apparently, we do not have that courage. Though our nation is a giant among nations, secure in might and wealth, it appears that we have grown fainthearted and timorous in maturity. The same Government which in its infancy shouldered the burden of the Fourth Amendment and walked steadfastly forward now stands before this Court with its hat in its hand, asking to be relieved of a portion

of that burden. This Government pleads that it is weak and vulnerable and that the enemies of order wax strong. This same Government finds the threat posed by the problem of drug traffic to be "substantial, if not compelling" (Pet. *Brief* at 35) in the context of the Fourth Amendment. But, every generation faces its own crises, threats, and challenges. Looking from the birth of our nation forward, we see objections to Federal taxes on whiskey developing into actual rebellion; further war with England with our very capitol in flames; civil war which produced conflict and desolation of an unequalled magnitude; a world war; a crusade against alcohol in which law enforcement actually had to admit defeat; a world-wide depression; another world war; the threat of nuclear holocaust; the problem of drug use and drug traffic; the problem of massive flow of illegal aliens; etcetera; to name but a few of the threats that we have faced. If we accept the fact that every one of these problems or threats is a "substantial, if not compelling" basis for further reduction in the scope of the Fourth Amendment, then we have accepted the piecemeal repeal of the Fourth Amendment and the only question remaining is the actual date of its final demise.

Hand in hand with this apprehension felt toward modern problems we also find a growing array of modern devices which in fulfilling their promise of aiding law enforcement and ameliorating our problems threaten to erase the private sanctuaries of home and offices by technological fiat. The first of these was the now-venerable wiretap, a challenge that was successfully met in *Berger v. New York*, 388 U.S. 41 (1967) and in another form in *Katz*. One of the more recent of these devices is the "beeper", but it is merely one of a host of recent inventions. These new devices have been a boon to those who find the Fourth

Amendment anachronistic if not dangerous, but yet lack the temerity to suggest outright repeal or avoidance of the amendment. These individuals see clearly and correctly that a mere disinclination against applying the Fourth Amendment to the inroads created almost daily by science will achieve the same result in the end. The embarrassing rejection of the ideals of our founding fathers can be thus viewed as a much more palatable acquiescense to "progress." Counsel finds this process just as repugnant to the oath which we all take to uphold the Constitution as would be an outright refusal to enforce the Fourth Amendment. Since we have long since accepted the notion that other portions of the Constitution should be expanded and interpreted so that they may encompass modern situations, failure to do so in the case of the Fourth Amendment will amount to intentional repeal.

We enjoy liberty largely because of the industry and sacrifice of others. And it is because of this that we are the most constricted when writing or ruling on the law set forth by the Constitution and the Bill of Rights. Ours must always be a guided hand. This must be so that we may successfully meet the perils and problems of the moment without succumbing to the fate of the spendthrift and losing the inheritance we have received. In this regard, the decision of the Tenth Circuit in *Karo* is a conservative application of the time-honored warrant requirements of the Fourth Amendment to the technology of today. *Karo,* like *Katz* before it, protects the sphere of privacy guaranteed by the Bill of Rights through the balance created by a judicial check while still allowing Government to enlist these devices in its criminal investigations. This balanced approach is far more consistent with

the history of the Fourth Amendment just examined than the position taken by the Government which strives to utilize these devices which implicate our very liberty and privacy in a manner limited only by administrative discretion and whim, an approach which would have been anathema to those who promulgated the Bill of Rights.

However much lip service we give to the ideals and spirit of the Fourth Amendment, it only becomes real if it is actually enforced with concrete intentions and means,[26] and this enforcement must be against all threats, whether ancient intrusions or the novel forms created by the inexorable progress of technology. If we were to do otherwise, the remainder of the Fourth Amendment would be like the remnants of a dam breached by flood, more of a memorial to what once was then a factor in our present or future. The Respondents would ask this Court to take firm hold of this inheritance so dearly bought by the labors and sacrifices of past generations and to affirm the decisions of the Trial Court and the Court of Appeals below.

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[26]Respondents would point to unenforced guarantees of privacy found in various constitutions throughout the world. For example see *U.S.S.R. Constitution*, Article 55, "Citizens of the U.S.S.R. are guaranteed inviolability of the home," etc.

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